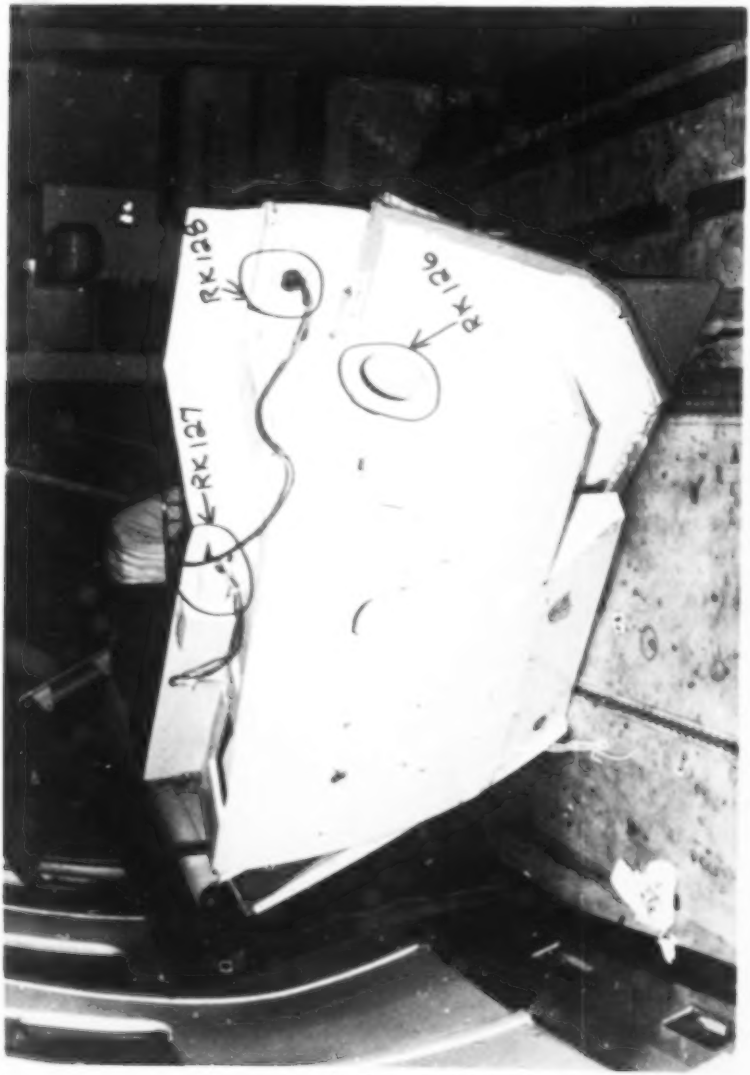

A-7 EXHIBIT NO. 2545

Nos. 82-1349 and 82-1350

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

S. A. EMPRESA DE VIACAO AEREA RIO GRANDENSE (VARIG AIRLINES)

UNITED STATES OF AMERICA, PETITIONER

v.

EMMA ROSA MASCHER, ET AL.

UNITED STATES OF AMERICA, PETITIONER

v.

UNITED SCOTTISH INSURANCE CO., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the United States is liable under the Federal Tort Claims Act as a "private individual under like circumstances" for the Federal Aviation Administration's alleged failure to discover a safety defect while carrying out its regulatory duty of certifying the airworthiness of aircraft in commercial aviation.

2. Whether suits against the United States alleging that the FAA negligently certified an aircraft's design and a heater's installation as complying with minimum safety standards, as part of the agency's effort to regulate compliance with those standards, are barred as claims based upon the performance of a "discretionary function" within the meaning of 28 U.S.C. 2680(a).

3. Whether suits against the United States alleging that the FAA negligently inspected and certified an aircraft's design and a heater's installation are barred as "claim[s] arising out of * * * misrepresentation" within the meaning of 28 U.S.C. 2680(h).

PARTIES TO THE PROCEEDING

Respondents not named in the caption to No. 82-1349 are listed in 82-1349 Pet. App. 18a-24a. Respondents not named in the caption to No. 82-1350 are Kathryn Fleming, Maxine Cearley, Simone Weaver, and John W. Dowdle.

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In the Supreme Court of the United States

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No. 82-1349

UNITED STATES OF AMERICA, PETITIONER

v.

S. A. EMPRESA DE VIACAO AEREA RIO GRANDENSE (VARIG AIRLINES)

UNITED STATES OF AMERICA, PETITIONER

v.

EMMA ROSA MASCHER, ET AL.

No. 82-1350

UNITED STATES OF AMERICA, PETITIONER

v.

UNITED SCOTTISH INSURANCE CO., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals in *Varig Airlines* and *Mascher*, No. 82-1349 (Pet. App. 1a-7a), is reported at 692 F.2d 1205.[1] The findings of fact and conclusions

[1] This opinion was originally handed down on October 8, 1982. It was subsequently reissued on October 26, 1982, to include *Emma Rosa Mascher* v. *United States* in the caption.

of law of the district court (Pet. App. 8a-13a) are not reported.

The opinion of the court of appeals in *United Scottish Insurance*, No. 82-1350 (Pet. App. 1a-6a), is reported at 692 F.2d 1209. The opinion of the district court (Pet. App. 7a-15a) and its findings of fact and conclusions of law (*id.* at 16a-27a) are not reported. An earlier opinion of the court of appeals in *United Scottish Insurance* is reported at 614 F.2d 188.

JURISDICTION

The judgments of the court of appeals in No. 82-1349 and No. 82-1350 were entered on October 8, 1982 (82-1349 Pet. App. 16a, 17a; 82-1350 Pet. App. 30a). On December 28, 1982, Justice Rehnquist extended the time within which to file petitions for a writ of certiorari to and including February 11, 1983. The petitions were filed on February 10, 1983 and were granted on May 16, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Federal Tort Claims Act are set out in a statutory appendix (App., *infra*, 1a).

STATEMENT

1. *Federal Regulation of Air Safety*

The federal government first entered the field of general aviation safety in 1926, when Congress passed the Air Commerce Act, ch. 344, 44 Stat. 568 *et seq.* Prior to that time regulation of the industry had been left to the states or municipalities. "[T]he Air Commerce Act * * * asserted the right of the federal government to regulate interstate flying and provided for the inspection and regulation of commercial aircraft * * *." E. Freudenthal, *The Aviation Business* 77 (1940).

Regulatory authority under the Act was delegated to the Secretary of Commerce, with a specific provision calling for the "rating of aircraft of the United States as to their airworthiness." Section 3(b) of the Air Commerce Act of 1926, 44 Stat. 569. The Secretary was authorized to require "full particulars" regarding the design and materials needed to construct the aircraft as a condition to registration (*ibid.*). He was expressly given discretion to accept reports from qualified persons employed by the manufacturer or to require the examination of aircraft by employees of the federal government (*ibid.*). In granting the Secretary this discretion, Congress made plain its understanding that the government was not the primary protector of civil aviation safety. As the House Report on the Act explained (House Comm. on Interstate and Foreign Commerce, 69th Cong., 1st Sess., *Civil Aeronautics: Legislative History of the Air Commerce Act of 1926* 34 (1928)):

> It is not to be expected that Government representatives will, for instance, individually inspect each aircraft for its airworthiness from day to day. Rather, Federal inspection will take the form of seeing to it that operators install proper inspection systems of their own and of checking up from time to time the actual effect of the system used by the operator.

In the more than 50 years since the enactment of the Air Commerce Act, the basic role of the federal government with regard to inspection and certification of civil aircraft has not changed. The safety standards have become more detailed, but the concept remains that the manufacturer or operator of the aircraft retains the ultimate responsibility to make certain that the aircraft satisfies those standards. Thus, in enacting the Civil Aeronautics Act of 1938, which transferred the responsibility for regulating air safety from the Secretary of Commerce to the Civil Aeronautics Authority (CAA), "[t]he existing methods of safety regulation [were] permitted

to remain virtually as they [were] under existing law * * *." H.R. Rep. No. 2254, 75th Cong., 3d Sess. 2 (1938). See also *id.* at 4.[2] Indeed, Congress added Section 605(a) of the Act, which "expressly makes it the duty of air carriers and their employees to comply with the regulations of the Authority regarding the inspection, maintenance, overhaul and repair of equipment." H.R. Conf. Rep. No. 2635, (Pt. 1), 75th Cong., 3d Sess. 82 (1938).

In 1958, Congress again transferred regulatory authority over aviation safety, this time to the Federal Aviation Agency. This agency later was renamed the Federal Aviation Administration (FAA) and was placed in the Department of Transportation. Pub. L. 89-670, Sections 3(c), 6(c)(1), 80 Stat. 932, 937 (1966). In the Federal Aviation Act of 1958, 49 U.S.C. (& Supp. V) 1301 *et seq.*, as it exists today, Congress has directed the Secretary of Transportation generally "to promote safety of flight of civil aircraft" by prescribing "minimum standards governing the design, materials, workmanship, construction, and performance of aircraft * * *." 49 U.S.C. 1421(a) and (1). At the same time, Congress retained the provision from the 1938 Act that imposed the primary duty on "every person [in the aviation industry] engaged in operating, inspecting, maintaining, or overhauling equipment to observe and comply" with the statutory and administrative standards prescribed by the Secretary. 49 U.S.C. 1425(a). See also 49 U.S.C. 1421(b).

2. *The FAA's Airworthiness Certification Process*

In order to monitor adequately the aviation industry's compliance with the Secretary of Transportation's mini-

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[2] The legislation was passed primarily to consolidate in one agency the regulatory functions previously undertaken by several different agencies. In addition, Congress wanted to increase the degree of economic regulation of air carriers. H.R. Rep. No. 2254, 75th Cong., 3d Sess. 1-2 (1938). Accordingly, the legislative history contains little discussion regarding regulation of safety in air commerce.

mum safety standards, Congress provided generally for a multi-step process for certifying the safety of aircraft. The FAA, acting as the Secretary's designee, has promulgated extensive regulations establishing minimum safety standards that must be satisfied by the designer or manufacturer of an aircraft at each step in the certification process. Each step culminates in the issuance of a certificate by the FAA; it is unlawful to operate in air commerce any aircraft that does not have a current "airworthiness certificate." 49 U.S.C. (& Supp. V) 1430(a).

Pursuant to its mandate "to promote safety of flight" by prescribing "minimum standards governing the design, materials, workmanship, construction, and performance of aircraft * * *" (49 U.S.C. 1421(a)), the FAA has promulgated Part 21 of the Federal Aviation Regulations (14 C.F.R.) entitled *Certification Procedures For Products and Parts.* In addition, and pursuant to the same mandate, the FAA has promulgated Parts 23, 25, 27, 29, 31, 33, and 35 of the Federal Aviation Regulations. Each of these parts concerns a specific category of aircraft or product (normal category airplanes, transport category airplanes, normal category rotorcraft, transport category rotorcraft, aircraft engines and propellers). Collectively, theses parts have become known as the FAA's *Airworthiness Standards*, and in all, they account for over 500 pages of text in Title 14 of the Code of Federal Regulations.

Before introducing a new type of aircraft, a manufacturer must first obtain a "type certificate," which requires FAA approval of the basic design of the aircraft. 49 U.S.C. 1423(a); 14 C.F.R. 21.11-21.53. The manufacturer supplies the FAA with design drawings, which FAA employees or private employees who represent the agency examine for compliance with minimum safety standards. Through this process, which may take years to complete, a basic design is approved and a type certificate is issued. See generally National Academy of Sciences, Committee on FAA Airworthiness Certification

Procedures, *Improving Air Safety* 19-20 (1980) (hereinafter "*NAS Report*").[3]

The manufacturer then applies for a "production certificate" based on a prototype of the aircraft. 49 U.S.C. 1423(b); 14 C.F.R. 21.131-21.165. This certificate authorizes the manufacturer to produce copies of the prototype so long as they are identical to the "type" approved. The manufacturer must supply detailed information regarding materials used and production methods employed. 14 C.F.R. 21.143. In addition, FAA employees or designated representatives (see page 8 & note 7, *infra*) inspect the prototype and test fly it "to determine compliance with the applicable [minimum safety standards]." 14 C.F.R. 21.157.

After the manufacturer receives a production certificate, and assuming no limitations are imposed on the certificate, it may begin mass production of the approved aircraft. The manufacturer must, however, obtain an "airworthiness certificate" for each aircraft that is assembled. This requires that the aircraft be inspected by FAA employees or designated representatives of the manufacturer to determine whether the plane conforms to the prior certifications and all minimum safety standards. 49 U.S.C. 1423(c); 14 C.F.R. 21.171-21.199.

An additional certificate is required for aircraft that are altered by the introduction of a major change in the type design. 14 C.F.R. 21.113. In order to obtain a "supplemental type certificate," the applicant must supply the FAA with drawings and other data sufficient to "show that the altered product meets applicable airworthiness requirements * * *." 14 C.F.R. 21.115. The FAA's re-

[3] As an indication of the magnitude of the agency's task in attempting to assure that a type design complies with the hundreds of different minimum safety standards, one manufacturer estimated that in the course of obtaining a type certificate for a new aircraft it would submit to the FAA approximately 300,000 engineering drawings and changes, 2000 engineering reports and 200 vendor reports. In addition, the manufacturer would submit data from some 80 ground tests and 1600 flight test hours. See *NAS Report, supra*, at 29.

view is often limited to an examination of photographs or diagrams of the proposed change. *FAA, Order Type Certification* 31-32 (reprint 1967) (hereinafter cited as "*Handbook*").[4] Unlike the inspection process that is followed for other certifications (see pages 8-9, *infra*), the FAA's *Handbook* requires a physical inspection of the "prototype modification" if compliance "cannot be determined adequately from an evaluation of the technical data." *Id.* at 32. The inspections are to be conducted by "an FAA representative." *Ibid.*

With regard to conformity, the FAA's *Handbook* clearly states that "[i]t is the primary responsibility of manufacturing inspectors to determine that prototype products * * * conform with drawings [and] specifications * * *." *Handbook, supra*, at 39. Furthermore, the intensity of the agency's inspection varies depending on its experience with the manufacturer. For manufacturers that have a record of acceptable quality control and inspection, the FAA's "conformity determination may be made through a planned system of spot-checking * * * and by reviewing inspection records and materials review dispositions." *Ibid.*[5]

One last certificate issued by the FAA, the Class I Export Certificate of Airworthiness, is relevant to these cases. 14 C.F.R. 21.321-21.339. This certificate, which may be obtained from the FAA upon request, informs a foreign government that a particular aircraft exported from the United States complies with the design approved by the agency and is in condition for safe operation at the time of export. The aircraft involved in the accident giving rise to the *Varig and Mascher* cases was exported to Brazil.

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[4] A copy of the FAA's *Handbook* has been lodged with the Clerk of this Court.

[5] Supplemental type certificates are the certificates most frequently issued by the FAA, especially with regard to general aviation aircraft. Last year the FAA issued more than 1,800 supplemental type certificates.

In light of the extensiveness and complexity of the safety standards (14 C.F.R. 23.1-23.1589) and the large number of aircraft requiring certification, the FAA is unable to monitor or inspect directly every aspect of every design, prototype or assembled aircraft. Indeed, since there are fewer than 400 engineers employed by the FAA, it is plain that they can perform only a small percentage of the inspections required for certifications. See *NAS Report*, *supra*, at 29. Accordingly, consistent with the statutory scheme (49 U.S.C. 1425(a)), the regulations impose upon each applicant for a certificate an obligation, *inter alia*, to "make all inspections and tests necessary to determine * * * [c]ompliance with the applicable airworthiness * * * requirements." 14 C.F.R. 21.33 (b)(1).[6] In addition, the vast majority of the FAA's inspections are performed by "designated engineering representatives," who typically are employees of the manufacturer or operator of the aircraft, but are licensed by the FAA. 14 C.F.R. 183.29.[7]

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[6] 14 C.F.R. 21.33(b) provides:

> *Each applicant must make all inspections and tests necessary to determine—*
>
> (1) Compliance with the applicable airworthiness and aircraft noise requirements;
>
> (2) That materials and products conform to the specifications in the type design;
>
> (3) That parts of the products conform to the drawings in the type design; and
>
> (4) That the manufacturing processes, construction and assembly conform to those specified in the type design.

[7] The *NAS Report* (at 29-30) explains the magnitude of the certification process and the agency's response to it:

> FAA engineers cannot review each of the thousands of drawings, calculations, reports, and tests involved in the type certification process; yet the agency must be certain that each design for a new airplane meets all the regulatory requirements. The present system thus depends not only on the quality of the FAA staff but also on the assistance rendered by aircraft company employees called Designated Engineering

For each aircraft, therefore, literally dozens of inspections are conducted by different individuals—most of whom are not federal employees—with engineering expertise in a particular area.[8] Indeed, it is not uncommon for airworthiness certificates for mass produced aircraft to be issued without any FAA employee's ever having looked at the specific aircraft; virtually all inspections at the plant are conducted by designated representatives of the manufacturer.[9] *NAS Report*, *supra*, at 29-30. FAA representatives do no more than spot check the manufacturers' safety controls and sign the certificate based on the designated representatives' assurances that the aircraft complies with FAA standards. *Id.* at 32. The FAA-signed certificate does not indicate who conducted the various inspections performed on the different parts of the aircraft (J.A. 278).

3. *The* United Scottish Insurance *Case*

a. On October 8, 1968, a DeHavilland Dove aircraft, owned and operated by an air taxi service doing business as Catalina Vegas Airlines, crashed three minutes after taking off from Las Vegas, Nevada en route to San Diego, California. See 614 F.2d 188, 189 (1979). The pilot, co-pilot and two passengers were killed (*ibid.*).

Representatives (DERs) who review the design and design process to make sure, on behalf of the FAA, that all aspects of the regulations are complied with.

[8] The non-employee representatives are not subject to any direct FAA control, but there are spot checks of their work. See generally Dilk, *Negligence of FAA Administration Delegates Under the Federal Tort Claims Act*, 42 J. Air L. & Com. 575, 583 (1976).

[9] For aircraft manufactured pursuant to a previously issued production certificate, the agency's manual expressly relieves the manufacturer of the obligation to submit each airplane to an agency inspection. The manual states: "[N]or is it necessary for the FAA representative to inspect each aircraft to determine conformity with the approved type design." FAA, *Airworthiness Certification of Aircraft and Related Approvals* 30-31 (1982). A copy of this manual has been lodged with the Clerk of this Court.

The cause of the crash was an in-flight fire located in the forward baggage compartments of the airplane.

The airplane that crashed was manufactured in 1951 in the United Kingdom. At some point prior to 1965, the airplane was purchased by Air Wisconsin, another air taxi operator. In 1965, pursuant to a contract with Air Wisconsin, Aerodyne Engineering Corporation ("Aerodyne"), a large and well respected manufacturer in the aviation industry (see J.A. 234), installed a gasoline fueled heater into both the DeHavilland Dove that crashed and a sister airplane also owned by the airline (614 F.2d at 190). Aerodyne applied for a supplemental type certificate (see page 6, *supra*) to authorize the installation. Thereafter, the heater was installed by Aerodyne and, pursuant to the FAA's *Handbook*, should have been inspected by representatives of both Aerodyne and the FAA (see pages 6-7, *supra*; J.A. 233-234). The supplemental type certificate was issued in 1965.[10]

In 1966, the airplane was sold to respondent Dowdle, who owned Catalina-Vegas Airlines. Dowdle sent a mechanic to Wisconsin to check out the airplane; relying in part on the supplemental type certificate as an indication of the airworthiness of the airplane, Dowdle's mechanic recommended that the plane be purchased (J.A. 229). Between 1966 and the crash in 1968, Dowdle's employees inspected the aircraft on at least eight different occasions, including two major yearly inspections of the gasoline heater (J.A. 232-233).

b. *The First Trial and Appeal.* In the wake of the crash, five law suits were filed against the United States under the Federal Tort Claims Act, 28 U.S.C. (& Supp.

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[10] The record fails to establish either who inspected the installation or even if there actually was an inspection. Accordingly, there is no evidence reflecting the quality of the inspection. The evidence at trial indicated only that an employee of the FAA signed the final certificate and that he relied on the FAA's general practices to ensure that there had been a compliance inspection (J.A. 280).

V) 2671 *et seq.*, in the United States District Court for the Southern District of California. Three suits for wrongful death were filed by the estates of victims of the accident; one suit for property damage to the De-Havilland Dove was filed by respondent Dowdle, the owner of the air taxi service; and one suit for monies paid for liability coverage on behalf of the owner of the plane was filed by a group of insurance companies.[11]

After trial, the district court entered judgment for respondents. The court found that the crash occurred because the gasoline line leading to the heater was not adequately clamped to reduce vibration (J.A. 309-310). The court concluded that the excessive vibration, coupled with a faulty connection in the line between copper and stainless steel tubing, allowed the gasoline to leak and ignite (J.A. 314-315). Relying upon 14 C.F.R. 23.993, which requires fuel lines to have sufficient support to "prevent excessive vibration," the court held that the aircraft was not airworthy as "supplemented" and that the government was negligent in certifying an installation that did not comply with its regulations. The district court also found no contributory negligence on the part of any of the respondents.[12]

The court of appeals reversed (614 F.2d 188 (1979)). The court of appeals held that the district court erred in ruling that a federal statutory duty "automatically give[s] rise to a duty of care to which a state's negligence per se doctrine would be applied" (*id.* at 193). Rather, because the United States is liable only "in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. 2674, "[t]he crucial inquiry is

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[11] Respondents Fleming and Cearley settled claims against Catalina-Vegas Airlines for a total of $100,000 received from its insurer. Law suits on behalf of respondents also were filed in Texas state court against Aerodyne. Those suits apparently are still pending.

[12] The district court subsequently awarded a total of $200,000 in damages against the United States.

whether, in undertaking the inspection, a duty arose under state law because of the relationship thereby created—the good samaritan rule" (614 F.2d at 194). The court of appeals expressly declined (*id.* at 190) to consider contentions that respondents' suits were barred by the discretionary function and misrepresentation exceptions to the Federal Tort Claims Act, 28 U.S.C. 2680(a) and (h), and instead remanded the case to the district court to determine whether the evidence was sufficient to support a finding of liability under the good samaritan doctrine.

c. *The District Court's Decision on Remand.* On remand, the district court, after taking additional testimony,[13] again entered judgment in favor of respondents. The court, applying California law (82-1350 Pet. App. 11a), found that California courts have recognized tort liability under the good samaritan rule as set forth in Sections 323 and 324A of the *Restatement (Second) of Torts* (1965).[14] Although the district court was "reluc-

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[13] Respondent Dowdle's mechanic testified that he relied upon the supplemental type certificate in deciding whether to approve the airplane for purchase (J.A. 229). Respondent Cearley testified that her husband, a passenger on the plane, was aware of the government's regulatory efforts to make air travel safe (J.A. 238-239).

[14] Section 323 of the *Restatement* provides:

> One who undertakes, gratuitously or for consideration, to render services to another, which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.

Section 324A of the *Restatement* provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from

tant to conclude [that] the government's inspection increased the risk of harm in 'some positive way'" (82-1350 Pet. App. 14a, quoting *Blessing* v. *United States*, 447 F. Supp. 1160, 1199 (E.D. Pa. 1978)), it determined that the United States was liable under the good samaritan rule because respondents "have demonstrated the requisite degree of reliance on the government's inspection and certification. The task of inspection, which is undertaken to protect passengers, is relied upon by such individuals, and if it is negligently performed, it gives rise to the very dangers it was intended to prevent" (82-1350 Pet. App. 14a).

d. The *Court of Appeals' Decision.* The court of appeals affirmed (82-1350 Pet. App. 1a-6a). The court held (*id.* at 3a) that the government had performed a "service" to decedents and the airline owner within the meaning of the good samaritan doctrine because "the F.A.A.'s regulatory activities are performed for the public as a whole" and "[w]hen voluntarily performing activities solely for the safety of the public, the F.A.A. performs a service for others." The court also concluded that, "[h]aving chosen to make aircraft safety inspections and to certify the results, the government reasonably could expect that members of the public would rely on the government's certification of airworthiness" (*id.* at 3a-4a).

Having found that the district court properly imposed liability on the government under state tort law, the court of appeals considered whether respondents' claims were barred by either the misrepresentation or discretionary function exceptions to the Tort Claims Act. The

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his failure to exercise reasonable care to protect his undertaking, if

(a) his failure to exercise reasonable care increases the risk of such harm, or

(b) he has undertaken to perform a duty owed by the other to the third person, or

(c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

court ruled that the misrepresentation exception did not bar this action because "[t]he basis of the [respondents'] claim * * * is not the misrepresentation or misinformation contained in the certificate, but the negligence of the F.A.A.'s inspection on which the airworthiness certificate was issued" (82-1350 Pet. App. 4a-5a). The court also held that the discretionary function exception was inapplicable because, in light of the detailed FAA regulations, there was "no room for policy judgment" in the inspection and certification of the aircraft (*id.* at 5a-6a).

Judge Chambers concurred (82-1350 Pet. App. 6a), stating that "[m]ost of us thought when the Federal Tort Claims Act was passed that the discretionary exception * * * would preclude recovery on the facts of the two cases we decide today, but the developing law seems to have overtaken us." Judge Chambers did not cite the "developing law" upon which he relied.

4. *The* Varig Airlines *and* Mascher *Cases*

a. These consolidated cases involve the crash of a Boeing 707 airplane, which was designed, manufactured, tested, inspected and assembled by the Boeing Company (82-1349 Pet. App. 9a). The Civil Aeronautics Agency (CAA), a predecessor of the Federal Aviation Administration, was responsible for ensuring that the designs, plans, specifications and performance data for the Boeing 707 aircraft were inspected for conformity to the agency's minimum safety standards. The CAA issued a type certificate in 1958, 15 years prior to the accident at issue here (*ibid.*).

Boeing sold the airplane to Seaboard Airlines for domestic use. In 1969, Seaboard resold the plane to respondent Varig Airlines, a Brazilian commercial air carrier (*ibid.*).[15] At that time the airplane was removed

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[15] There is no evidence that an Export Certificate was ever requested by or issued to respondent Varig or the appropriate Brazilian agency. J.A. 105; see page 7, *supra*.

from the United States Civil Aircraft Registry and placed on the Brazilian registry (14 C.F.R. 21.335(e)(1); J.A. 103-104). Consequently, the FAA airworthiness certificate previously issued to the airplane became invalid and, indeed, was no longer required by federal law so long as the plane did not fly within the airspace of the United States (*ibid.*). The ultimate responsibility for regulating the airworthiness of the airplane then rested with the state of registry (in this case, Brazil). See 49 U.S.C. (& Supp. V) 1401 and 1508(b).

On July 11, 1973, the Boeing 707 airplane crashed while on a commercial flight from Rio de Janeiro to Paris, France (82-1349 Pet. App. 8a). A few minutes before the scheduled arrival at Orly Airport, a fire broke out in one of the aft lavatories (82-1349 Pet. App. 2a). Thick, black smoke quickly filled the entire cabin and cockpit area and caused the airplane to make a crash landing into a field a few miles from the airport (*ibid.*). All but 11 of the 135 persons aboard died from asphyxiation caused by inhaling toxic gases (*ibid.*). A post-impact fire consumed most of the air fuselage, including the aft lavatory structure and most of the floor and cargo area beneath and forward of the aft lavatories.

b. *The District Court Proceedings.* Following the accident, two consolidated actions were filed against the United States under the FTCA in the United States District Court for the Central District of California. The *Varig Airlines* suit involved a claim for damages for the destroyed Boeing 707. The *Mascher* suit involved claims for wrongful death brought by families and personal representatives of 62 passengers.[16]

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[16] Representatives of the passengers also brought suit in New York state court against Boeing Company, Seaboard World Airlines, and five subcomponent manufacturers. These suits were settled in 1977. In addition, claims on behalf of the victims were filed against respondent Varig, but under the provisions of the Warsaw Convention, Varig's liability in the event of the death of a passenger was limited to $10,000 per passenger.

Varig Airlines brought a separate action against Boeing and a subcomponent manufacturer in the United States District Court for

Respondents claimed that the pre-impact fire originated in the towel disposal area located below the sink unit of one of the aft lavatories of the airplane and was caused either by an electrical malfunction or by passenger carelessness. They alleged that the towel disposal area was not capable of containing fire as required by agency regulations and that the CAA was negligent in its inspection of the plane and issuance of a type certificate for the Boeing 707 in 1958—15 years prior to the crash.[17]

The district court entered summary judgment for the United States (82-1349 Pet. App. 8a-13a). The court first noted that the Federal Tort Claims Act subjects the United States to liability only where a private person would be liable in "like circumstances" (*id.* at 10a); the court held that California law does not recognize a duty giving rise to liability in tort for inspection and certification activities (*id.* at 10a). The court further held that the FAA's inspection and certification responsibilities were regulatory functions, not operational services, and "[did] not give rise to an actionable duty in tort under California law" that extended to respondents

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the Central District of California. The district court granted summary judgment for the defendants and the court of appeals affirmed. *S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)* v. *Boeing*, 641 F.2d 746 (9th Cir. 1981).

[17] The applicable regulation, CAA § 4b.381 and (d), provided (quoted in 82-1349 Pet. App. 3a):

> *Cabin Interiors.* All compartments occupied or used by the crew or passengers shall comply with the following provisions.
>
> * * * * *
>
> (d) All receptacles for used towels, papers, and waste shall be of fire-resistant material, and shall incorporate covers or other provisions for containing possible fires.

No identical provisions exist in the FAA's regulations, but they do require that each compartment to be used by the crew or passengers must be made of flame resistant materials. 14 C.F.R. 23.853.

(*ibid.*). Specifically, the district court ruled that "the benefits of [the FAA's inspections] flow to the general public at large and not to any individual so as to render the United States liable for negligence in their performance" (*id.* at 11a) and that the FAA's actions did not relieve respondent Varig of the primary responsibility for the safety of the plane (*id.* at 12a).

Although the district court found no basis for imposing liability on the government based on any tort theory, it nevertheless held that respondents' claims also were barred by the discretionary function and misrepresentation exceptions to the Federal Tort Claims Act, 28 U.S.C. 2680(a) and (h) (82-1349 Pet. App. 12a).

c. *The Court of Appeals' Decision.* The court of appeals reversed (Pet. App. 1a-7a). Employing reasoning akin to that adopted by the same panel in its opinion issued the same day in the *United Scottish Insurance* case, the court ruled that the United States could be held liable under the good samaritan doctrine, as set forth in Sections 323 and 324A of the *Restatement (Second) of Torts* (1965) (see note 14, *supra*). In the court's view, the government had performed a "service" to respondents within the meaning of the doctrine because "the United States, through the F.A.A., has voluntarily undertaken the inspection and certification of all civilian aircraft" (82-1349 Pet. App. 5a). The court concluded in addition that the reliance element of the doctrine had been satisfied because, having issued regulations "designed to insure optimum safety," the government "should expect that members of the public will rely on the proper performance by the F.A.A. of its duty to inspect and certify" (*ibid.*). The court made no mention of the significance, if any, of the fact that all of the passengers on the aircraft were foreign residents or that respondent Varig had never attempted to obtain an export certificate of airworthiness.

The court of appeals ruled that the misrepresentation exception in 28 U.S.C. 2680(h) did not bar this action

because "[respondents'] claims * * * arise from the negligence of the inspection rather than from any ensuing misrepresentation contained in the resultant certificate" (82-1349 Pet. App. 6a). Finally, the court of appeals rejected the discretionary function exception in 28 U.S.C. 2680(a) as a bar to respondents' suit because "[t]he kind of discretion contemplated by the exemption clause does not exist in certifying compliance with F.A.A. safety regulations" (*id.* at 6a-7a).[18]

SUMMARY OF ARGUMENT

I.

A. When Congress in 1946 took the "radical" step of waiving the sovereign immunity of the United States for suits alleging negligence by federal employees, it decided to proceed cautiously for fear of causing an untoward disruption of the conduct of governmental affairs. Among the principal limitations placed on the waiver was that the United States may be sued only in circumstances where a private person could be held liable. 28 U.S.C. 1346(b) and 2674. Congress intended this limitation to exclude liability for the class of torts involving a "governmental function," and this Court recognized this congressional intent in cases decided shortly after the Federal Tort Claims Act was enacted. See *Feres* v. *United States*, 340 U.S. 135, 141 (1950); *Dalehite* v. *United States*, 346 U.S. 15 (1953).

Although the Court has held that the "private person" limitation is satisfied by a variety of government operational activities (see, *e.g.*, *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955) (operating a lighthouse); *Rayonier, Inc.* v. *United States*, 352 U.S. 315 (1957) (fighting a forest fire)), those activities are fundamentally different from the FAA's aircraft certification function. Certification of goods entering the channels of in-

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[18] Judge Chambers' concurring opinion in *United Scottish Insurance* also applied to this case (692 F.2d at 1212). See page 14, *supra*.

terstate commerce, as a means of protecting the public health and safety, is the essence of the government regulatory and law enforcement process. Such activities have no counterpart in the private sector. Thus, they may not form the basis for tort liability under the Act.

B. The court of appeals acknowledged that no private person assumes responsibilities comparable to those of the FAA. The court concluded, however, that the United States could be held liable under the good samaritan doctrine, as set forth in Sections 323 and 324A of the *Restatement (Second) of Torts* (1965). This tort theory has no application to the regulatory functions of the FAA.

First, the FAA did not undertake to perform a direct service for respondents or any other specific individual. The agency's mandate is to promote the safety of the public as a whole by enforcing minimum safety standards. Second, any service performed by the FAA was not necessary to protect respondents' safety. Airline manufacturers and operators have the primary responsibility for ensuring that their equipment is in working order. Finally, respondents did not and could not reasonably rely to their detriment upon the FAA's certification. It is not enough under the good samaritan doctrine that respondents were aware generally that the FAA has regulatory duties involving safety of aircraft; they must have foregone alternatives to protect themselves as a consequence of their awareness of the agency's actions. In sum, the relationship between respondents and the FAA is too remote to create a duty of care under the good samaritan doctrine.

II.

Respondent's claims also are barred by the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a). This exception, like the private person limitation, is intended to insulate the United States from "liability arising from acts of a government nature or function," or involving judgmental decision-making. *Dalehite* v. *United States*, 346 U.S. 15, 26 (1953).

The court of appeals erred in concluding that the FAA's certification process is merely a ministerial check of the aircraft to ascertain compliance with inflexible safety standards. To the contrary, the agency's responsibilities in issuing a certificate are permeated with discretionary determinations. First, the FAA must decide, in light of available resources and other considerations, whether to examine a particular aircraft, or instead to rely on the manufacturer's representation that it complies with the minimum safety standards. Second, in the event that the FAA actually examines an aircraft, it must make complicated scientific and engineering judgments whether the design or manufacture complies with numerous standards that have been drafted to allow design flexibility.

The fatal flaw in the court of appeals' analysis is the unwarranted assumption that the FAA checks every aircraft for compliance with every safety standard. But resource and other limitations preclude that regulatory approach, and the FAA's inspection manuals in fact expressly grant discretion to spot check an airplane, or to rely on a manufacturer's assurances and safety record. In essence, respondents contend that the FAA should have performed a more painstaking inspection prior to issuing certificates to the specific aircraft involved here. This claim ultimately depends on the assertion that the FAA abused its discretion to choose among reasonable regulatory alternatives by not checking these particular airplanes more thoroughly.

III.

Respondents' lawsuits arise out of the basic claim that they purchased or traveled on defective aircraft in reliance upon a certificate of airworthiness negligently issued by the FAA many years earlier. Such claims state the traditional and commonly understood tort of negligent misrepresentation (see *Restatement (First and Second) of Torts* § 311 (1934 & 1965)) and accordingly may not be maintained against the United States in light of the "misrepresentation" exception to the Federal Tort

Claims Act, 28 U.S.C. 2680(h). The court of appeals concluded that respondents' claims were based on the FAA's negligent inspection rather than misrepresentation. But, as the Court held in *United States* v. *Neustadt*, 366 U.S. 696 (1961), a claim of negligent inspection is part of the tort of negligent misrepresentation, when the injury flows from the plaintiff's reliance on the erroneous communication that is the product of the inspection.

Block v. *Neal*, No. 81-1494 (Mar. 7, 1983), does not support the decision below. That case involved an alleged breach of duty by the Farmers Home Administration to *supervise construction* of a home it financed, because a negligent inspection failed to discover defects that the agency might have corrected. Here, by contrast, respondents are far removed from the certification determination, because they neither manufactured nor owned the aircraft at the time of the FAA's inspection, and thus could rely, if at all, only on the FAA's issuance of a certificate.

ARGUMENT

I. THE FEDERAL AVIATION ADMINISTRATION'S FAILURE TO DISCOVER A SAFETY DEFECT WHILE CARRYING OUT ITS REGULATORY DUTY OF CERTIFYING THE AIRWORTHINESS OF AIRCRAFT IN COMMERCIAL AVIATION DOES NOT RENDER THE UNITED STATES LIABLE FOR DAMAGES UNDER THE FEDERAL TORT CLAIMS ACT AS "A PRIVATE INDIVIDUAL UNDER LIKE CIRCUMSTANCES"

A. The FAA's Inspection And Certification Process Is A Governmental Function, Which Congress Did not Intend To Subject To Tort Liability

1. The waiver of sovereign immunity in the Federal Tort Claims Act is subject to a significant limitation: the United States may be found liable only in circumstances where liability would be imposed on a private individual under state law. See 28 U.S.C. 1346(b) and 2674. In this way, Congress intended to make the federal government amenable to suit for "ordinary common-law torts"

(*Dalehite* v. *United States*, 346 U.S. 15, 28 (1953) (footnote omitted)); indeed, the legislative history of the FTCA is devoted almost exclusively to discussions regarding the need to supply a judicial remedy for automobile accidents involving government employees who drive negligently in the course of their employment.[19]

Despite the restricted scope of this waiver of sovereign immunity, the FTCA was regarded as "a radical innovation," which prompted Congress to proceed cautiously. *Tort Claims Against the United States: Hearings on H.R. 7236 Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 76th Cong., 3d Sess. 22 (1940). Accordingly, Congress made plain its intention that the Act should not extend to suits against the United States based on "that class of tort on the part of the Government which has to do with a governmental function, so to speak." 86 Cong. Rec. 12021 (1940) (remarks of Rep. Gwynne).

This Court recognized the limited nature of Congress' waiver of sovereign immunity in the earliest decisions interpreting the Tort Claims Act. In *Feres* v. *United States*, 340 U.S. 135, 141 (1950), the Court held that the

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[19] See, *e.g.*, 67 Cong. Rec. 11092, 11100 (1926) (remarks of Reps. Celler, Underhill); 69 Cong. Rec. 2192, 3118 (1928) (remarks of Reps. Lozier, Box); *General Tort Bill: Hearing Before a Subcomm. of the House Comm. on Claims*, 72d Cong., 1st Sess. 17 (1932); *Tort Claims Against the United States: Hearings on H.R. 7236 Before Subcomm. No. 1 of the House Comm. on the Judiciary*, 76th Cong., 3d Sess. 16 (1940); *Tort Claims Against the United States: Hearings on S. 2690 Before a Subcomm. of the Senate Comm. on the Judiciary*, 76th Cong., 3d Sess. 27-28 (1940); *Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary*, 77th Cong., 2d Sess. 28, 37, 39, 66 (1942); H.R. Rep. No. 2428, 76th Cong., 3d Sess. (1940); H.R. Rep. No. 2245, 77th Cong., 2d Sess. 10 (1942); H.R. Rep. No. 1287, 79th Cong., 1st Sess. 5 (1945); S. Rep. No. 1400, 79th Cong., 2d Sess. 31 (1946). The Tort Claims Act was adopted in 1946 after more than 20 years of congressional consideration. This Court has recognized that legislative statements made with regard to earlier versions of the FTCA are useful in understanding the meaning of the Act as eventually passed. *Dalehite* v. *United States*, 346 U.S. 15, 26-30 (1953).

Act does not waive sovereign immunity in situations where there is no liability for private individuals "even remotely analogous to that which [plaintiffs] are asserting against the United States." [20] The Court reemphasized the point three years later in *Dalehite* v. *United States*, *supra*, 346 U.S. at 32, when it explained that "Congress exercised care to protect the Government from claims, however negligently caused, that affected governmental functions." Thus, this Court has acknowledged that Congress, by providing the "private person" limitation as a condition to recovery, intended not only to adopt state law as the rule of decision for imposing tort liability (see *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955)), but also to preserve inviolate from tort suits a core of governmental activities that are never engaged in by private citizens.[21]

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[20] Another factor in *Feres* v. *United States*, *supra*, persuaded the Court that Congress did not intend to waive sovereign immunity in the circumstances of that case. The Court pointed to the need for uniform rules to govern federal activities that occur nationwide and the incongruity of subjecting military affairs to the vagaries of tort law in the different states. Similarly, here, Congress enacted a scheme designed to create a uniform set of aviation safety standards. Tort litigation in various localities will necessarily impair uniformity in the minimum standards. Compare *George* v. *United States*, 703 F.2d 90, 91-92 (4th Cir. 1983) (copper and stainless steel coupling is not a safety defect), with J.A. 314-315 (copper and stainless steel coupling is a defect). Indeed, under the conflict of laws ruling by the district court in *United Scottish Insurance* (82-1350 Pet. App. 10a), it is impossible to predict what legal standard might be applied to any given inspection. The inspections in that case took place, if at all, in Texas and thus that State's tort law would seemingly apply. But the district court decided that Texas would adopt California law because respondents resided in California and purchased their airplane tickets there. Since the governing law to be applied turns on such fortuity, uniformity in inspection standards is plainly unattainable.

[21] The "discretionary function" exception to the Tort Claims Act, 28 U.S.C. 2680(a), provides comparable, and to a certain extent overlapping, protection against suits challenging regulatory activities, thus emphasizing Congress' concern that the United States

To be sure, this Court has declined on occasion to apply the private person limitation so as to insulate certain governmental activities from suit. In *Indian Towing Co.* v. *United States*, *supra*, the Court held that the Coast Guard's negligent operation of a lighthouse that caused a boat to run aground was not exempt from liability as a uniquely governmental activity. In addition, the Court rejected similar claims with regard to Forest Service firefighting activities (*Rayonier, Inc.* v. *United States*, 352 U.S. 315 (1957)) and the Bureau of Prison's efforts to care for inmates at a federal correctional facility (*United States* v. *Muniz*, 374 U.S. 150 (1963). Critical to each of those cases, however, was the fact that the government agency involved had assumed direct, operational responsibility for the activity that caused the injury. The analogy between claims based on these kinds of operational activities and those that Congress had uppermost in its mind in adopting the Tort Claims Act—suits alleging negligence by government employees in operating a motor vehicle—is quite close. Indeed, the Court in *Indian Towing*, in discussing a hypothetical case, expressly compared negligent operation of an automobile to the negligent operation of a lighthouse and concluded that there was no "rational ground * * * why there should be any difference in result[]." 350 U.S. at 66.

But there is an obvious and fundamental difference between driving a car and the government's quintessentially sovereign function of inspecting an aircraft for the purpose of certifying whether it may lawfully use the nation's airspace. Regulatory conduct such as that performed by the FAA is engaged in solely by the government; thus, if the immunity for governmental functions, which Congress expressly intended to preserve, is to have any meaning, it must be applicable where, as here, the

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not be held liable in damages for engaging in core governmental activities. As explained below, we also believe that these suits are barred by that provision. See pages 42-46, *infra*.

government performs its unique law enforcement role over private industry.[22]

The actions of a government agency in enforcing health and safety legislation pursuant to a program of inspection and certification have no counterpart in the private sector. Unlike private testing laboratories, which certify the quality of a product at the request and for the benefit of a particular customer,[23] the government inspects and certifies for the purpose of protecting the general public, by eliminating defective or dangerous instrumentalities from the channels of interstate commerce. As we have explained, the FAA is required "to promote safety of flight of civil aircraft in air commerce" (49 U.S.C. 1421(a)), and, in prescribing standards, rules and regulations, and in issuing certificates, the FAA must "give full consideration to the duty resting upon air carriers to perform their services with the highest possible degree of safety *in the public interest*" (49 U.S.C. 1421(b); emphasis added). By the same token, the FAA may grant exemptions from applicable rules and regulations if it

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[22] It is unlawful "[f]or any person to operate in air commerce any civil aircraft for which there is not currently in effect an airworthiness certificate" (49 U.S.C. 1430(a)(1)). FAA inspection and certification, therefore, are integral steps in a program of law enforcement rather than a service performed for a particular airline or air passenger. See *Federal Aviation Act: Hearings on H.R. 12616 Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce*, 85th Cong., 2d Sess. 329 (1958).

[23] See generally Note, *Liability of Certifiers of Quality to Ultimate Consumers*, 36 Notre Dame Law. 176, 183 (1961); Note, *Tort Liability of Independent Testing Agencies*, 22 Rutgers L. Rev. 299, 325-326 (1968); Note, *Liability of a Testing Company to Third Parties*, 1964 Wash. U.L.Q. 77, 96-97. Indeed, California has recognized that such laboratories may be liable for negligently certifying the safety of a product. See *Hanberry* v. *Hearst Corp.*, 276 Cal. App. 2d 680, 683, 81 Cal. Rptr. 519, 521 (Ct. App. 1969). The basis for liability was, however, "negligent misrepresentation," which is expressly excluded from the waiver of sovereign immunity in 28 U.S.C. 2680(h). See *United States* v. *Neustadt*, 366 U.S. 696 (1961), and pages 46-50, *infra*.

"finds that such action would be *in the public interest*" (49 U.S.C. 1421(c); emphasis added). When the FAA breaches these obligations by issuing an unwarranted certificate, it has breached its governmental responsibilities to the general public, not any duty of care to an individual. The remedy for such breach is corrective administrative action or modification of the agency's duties by Congress, not judicial review through tort litigation brought by private plaintiffs.

It is simply inconceivable that Congress, when it enacted the Tort Claims Act with an intention to protect from suit certain core governmental, regulatory activities and to move cautiously because of the radical nature of the Tort Claims Act concept (see page 22, *supra*), meant to waive sovereign immunity for claims based on administrative inspection and certification activities.[24] Inspection and certification are the lifeblood of the administrative process; "[l]icensing is [a] widely used regulatory technique that is characteristically employed * * * to enforce minimal qualification * * *." S. Breyer & R. Stewart, *Administrative Law and Regulatory Policy* 4 (1979). Numerous agencies of the federal government have inspection and/or certification authority and virtually every business that engages in interstate commerce is subject to some form of federally-administered certification or licensing requirement. To name just a few, the Nuclear Regulatory Commission inspects nuclear reactors,[25] the Food and Drug Administration inspects and

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[24] Needless to say, not a word in the voluminous legislative history of the FTCA supports such a result. Compare *United States* v. *Muniz*, *supra*, 374 U.S. at 153-158.

[25] 42 U.S.C. 2201(o). Indeed, there is now pending a Tort Claims Act suit for $4 billion arising out of the NRC's regulatory activities with regard to the Three Mile Island nuclear reactor. See *General Public Utilities Corp.* v. *United States*, 551 F. Supp. 521 (E.D. Pa. 1982). The government's motion to dismiss the complaint was denied on grounds similar to those relied on by the court below. The United States Court of Appeals for the Third Circuit has granted our petition for an interlocutory appeal (No. 83-1017).

certifies the safety of drugs and food,[26] the Federal Deposit Insurance Corporation inspects the financial records of federally-insured banks,[27] the Occupational Safety and Health Administration inspects the safety and health conditions of most work environments,[28] and the Mine Safety and Health Administration inspects the safety and health conditions of mines.[29]

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[26] 21 U.S.C. (& Supp. V) 374. See *Anglo-American & Overseas Corp.* v. *United States*, 144 F. Supp. 635 (S.D.N.Y. 1956), aff'd, 242 F.2d 236 (2d Cir. 1957).

[27] 12 U.S.C. (Supp. V) 1820(b). See *First State Bank* v. *United States*, 599 F.2d 558 (3d Cir. 1979), cert. denied, 444 U.S. 1013 (1980).

[28] 29 U.S.C. 657. See *Davis* v. *United States*, 536 F.2d 758 (8th Cir. 1976), aff'g 395 F. Supp. 793 (D. Neb. 1975).

[29] 30 U.S.C. (Supp. V) 813. See *Raymer* v. *United States*, 660 F.2d 1136 (6th Cir. 1981), cert. denied, 456 U.S. 944 (1982).

Of course, the list in the text only touches the surface. A cursory examination of the regulatory activities of several government agencies reveals an extraordinary array of inspection and certification activities. See, *e.g.*, 42 U.S.C. (& Supp. V) 1472 (Farmers Home Administration inspects homes built with financial assistance provided by the agency, see 7 C.F.R. 1804.4(d)); 7 U.S.C. (& Supp. V) 77 (Department of Agriculture inspects and certifies grain shipped from the United States to a foreign jurisdiction); 21 U.S.C. 455 (Department of Agriculture inspects poultry products); 21 U.S.C. (Supp. V) 603 (Department of Agriculture inspects "all cattle, sheep, swine, goats, horses, mules and other equines" before slaughtering, packing, or meat-canning); 7 U.S.C. (Supp. V) 150ff (Department of Agriculture inspects for plant pests persons or articles transported into this country); 21 U.S.C. 693 (Department of Agriculture inspects and certifies dairy products intended for export); 33 U.S.C. (& Supp. V) 1318 (Environmental Protection Agency inspects premises where an effluent source is located); 15 U.S.C. 2610 (Environmental Protection Agency inspects premises where work with chemical substances is performed); 7 U.S.C. 136g (Environmental Protection Agency inspects establishments where pesticides are distributed or sold); 42 U.S.C. (Supp. V) 6927 (Environmental Protection Agency inspects hazardous waste facilities); 45 U.S.C. 23 (Department of Transportation inspects locomotives, see *Norfolk & W.Ry.* v. *Brotherhood of Locomotive Engineers*, 459 F. Supp. 136, 143-44 (W.D. Va. 1978); 46 U.S.C. 39 (Coast Guard inspects and

The potential liability of the United States for failure to uncover defects or improprieties pursuant to these and other regulatory inspections is staggering. In the case of aircraft certifications alone, the United States would be amenable to suit whenever an accident caused by mechanical failure occurred anywhere in the world, if the airplane involved had at any time been inspected by the FAA.[30] And this liability could be imposed without the slightest evidence that the United States acted unreasonably in conducting its inspection. Negligence in *United Scottish Insurance* was based solely on *res ipsa loquitur*, and negligence in *Varig Airlines* and *Mascher* would necessarily be based on the same theory. Proof of actual fault cannot be established. While reliance on *res ipsa loquitur* in a particular FTCA case is certainly permissible, it is most unlikely that Congress intended to waive

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certifies biennially the hull and equipment of cargo barges over 100 gross tons); 15 U.S.C. (& Supp. V) 1401 (Department of Transportation inspects facilities manufacturing or introducing motor vehicles into commerce, see 49 C.F.R. 554.1 *et seq.*); 49 U.S.C. (& Supp. V) 1680, 1681(c) (Department of Transportation inspects pipeline facilities); 33 U.S.C. 1512 (Department of Transportation inspects deepwater ports); 33 U.S.C. 467a (Department of Army inspects dams); 38 U.S.C. 642 (Veterans Administration inspects state nursing care homes); 18 U.S.C. 923(g) (Department of Treasury inspects firearms or ammunition kept by importers, manufacturers, dealers and collectors); 21 U.S.C. 44 (Department of Health and Human Services inspects teas entering the United States); 15 U.S.C. 2065 (Consumer Product Safety Commission inspects establishments manufacturing, holding or transporting consumer products in commerce, see 16 C.F.R. 118.1 *et seq.* (1982), 1605.1 *et seq.*; and 42 U.S.C. (& Supp. V) 5413 (Department of Housing and Urban Development inspects the construction of mobile homes).

[30] The Sixth Circuit recognized this in *Garbarino* v. *United States*, 666 F.2d 1061, 1066 (1981): "[T]o extend the Government's liability to situations involving the alleged negligent issuance of safety inspection certificates * * * would be to make the Government a joint insurer of all activity subject to safety inspections." The facts of the *Varig Airlines* and *Mascher* cases show that this concern is not farfetched. There, the FAA inspection took place in 1958; the accident occurred on a flight by a foreign air carrier from Brazil to France in 1973.

sovereign immunity in a broad class of cases where virtually no specific proof of negligence or wrongful conduct by a federal employee will ever be available. Cf. *Laird* v. *Nelms*, 406 U.S. 797 (1972) (no recovery for strict liability under FTCA); *Dalehite* v. *United States*, *supra*, 346 U.S. at 44 (same).

We submit that Congress, by limiting the government's liability to that of a private person, did not intend to expose the United States to monetary liability, essentially as an insurer, as a result of certifications and inspections undertaken by administrative agencies to enforce compliance by private industry with mandatory health and safety requirements. To the contrary, this is precisely the sort of core governmental activity—law enforcement—that has no analogy in private tort litigation and that therefore was excluded from the limited waiver of sovereign immunity in the FTCA.

B. The State Law Duty Embodied in the Good Samaritan Doctrine Cannot Be Applied to the FAA's Inspection and Certification Process

Notwithstanding the uniquely governmental nature of the FAA's inspection and certification process, the court of appeals concluded that the United States' liability "as a private person" under the Tort Claims Act could be predicated on the good samaritan doctrine of tort law, adopted by California as set out in Sections 323 and 324A of the *Restatement (Second) of Torts* (1965) (see note 14, *supra*). The court of appeals' Procrustean effort to fit the FAA's certification process into the framework of the good samaritan doctrine, however, merely reinforces our submission that this law enforcement function is simply not a suitable basis for imposing tort liability.

1. *The FAA Did Not Perform A Necessary Service For Respondents*

In order to recover under Sections 323 and 324A of the Restatement, the plaintiff must first demonstrate that the defendant undertook to render a *service* to another, which

was *necessary* for the other's protection. The court of appeals' conclusion (82-1350 Pet. App. 3a) that "[w]hen voluntarily performing activities solely for the safety of the public, the F.A.A. performs a service for others" fails to recognize the crucial distinction between the FAA's conduct and that of the traditional good samaritan recognized by state tort law. To satisfy the good samaritan doctrine, it must be shown that "the purpose of the action was to render a *direct* service to the person who was harmed, or to persons of that class." *Roberson* v. *United States*, 382 F.2d 714, 720 (9th Cir. 1967) (emphasis added). See also *Patentas* v. *United States*, 687 F.2d 707, 716 (3d Cir. 1982); *Evans* v. *Liberty Mutual Insurance Co.*, 398 F.2d 665, 666-667 (3d Cir. 1968). For instance, the doctrine applies where an employer undertakes to transport an ill employee to her home and does so negligently. See *Restatement (Second) of Torts* § 323 comment c, illustration 1. Other common examples are (382 F.2d at 720):

> an employer gratuitously furnished medical aid to an employee, and was negligent in selecting a physician, *Vesel* v. *Jardine Mining Co.*, 110 Mont. 82, 100 P.2d 75, 127 A.L.R. 1093; a water company gratuitously removed a meter and left the plaintiff's premises in a dangerous condition, *Walsh* v. *Hackensack Water Co.*, 181 A 422, 13 N.J. Misc. 815; a landlord gratuitously undertook to repair a water pipe and did so in a negligent manner, *Tarnogurski* v. *Rzepski*, 252 Pa. 507, 97 A 697.

The activities performed by the FAA are far removed from these examples or from other situations contemplated by the good samaritan doctrine. As one court has accurately explained (*Grogan* v. *Commonwealth of Kentucky*, 577 S.W.2d 4, 5 (Ky. 1979) (citation omitted):

> [I]n the enactment of laws designed for the public safety a governmental unit does not undertake to perform the task; it attempts only to compel others to do it, and as one of the means of enforcing that

> purpose it may direct its officers and employees to perform an inspection function. The failure of its officers and employees to perform that function does not constitute a tort committed against an individual who may incidentally suffer injury or damage, in common with others by reason of such default.

The FAA's mandate is to promote the safety of the public as a whole by enforcing minimum safety standards. Congress made it unlawful "[f]or any person to operate in air commerce any civil aircraft for which there is not currently in effect an airworthiness certificate" (49 U.S.C. 1430(a)(1)) and authorized the FAA to adopt an inspection and certification process as integral steps in a program of law enforcement (see pages 4-9, *supra*). The FAA's function is designed to encourage private entities to comply voluntarily with minimum safety standards, and, if possible, to prohibit those who fail to comply from using our airspace. Manufacturers and operators of commercial aircraft are *regulated* by the FAA; the FAA does not perform an inspection service for their benefit, any more than the Internal Revenue Service performs an audit for the benefit of a taxpayer. By the same token, the general flying public undoubtedly is an incidental beneficiary of the FAA's enforcement activities, just as the general public is a beneficiary of all governmental regulatory activities; but the FAA does not purport to act as a private testing service for each passenger.

The inapplicability of the good samaritan tort doctrine to the FAA's certification process is perhaps best demonstrated by comparing the instant cases to the California cases relied upon by the district court in *United Scottish Insurance*. In *Coffee* v. *McDonnel-Douglas Corp.*, 8 Cal. 3d 551, 125 Cal. Rptr. 358, 503 P.2d 1366 (1972), the court held that an employer was liable for injuries caused by its failure to inform plaintiff that a blood test the employer had voluntarily administered to plaintiff indicated the presence of a potentially serious illness. The court did not hold that the employer was under a duty to discover

the disease, but only that given its relationship to the employee, the employer had a duty to disclose any "dangerous condition revealed in a physical examination." 8 Cal. 3d at 559.

The other two cases are even more distantly related. *Schwartz* v. *Holmes Bakery Limited*, 67 Cal.2d 232, 60 Cal. Rptr. 510, 430 P.2d 68 (1967), involved a claim for personal injury caused by a bakery truck driver who negligently instructed a 14-year-old customer on how to approach the truck. And, in *Brochett* v. *Kitchen Boyd Motor Co.*, 264 Cal. App. 2d 69, 70 Cal. Rptr. 136 (1968), an employer was held liable for allowing a minor employee to become intoxicated and then to drive home alone.

All of those cases are obviously distinguishable from the instant cases in several significant respects. To begin with, there is a major difference in the directness of the relationship between the parties, which necessarily affects the duty of the defendant. See W. Prosser, *Handbook of the Law of Torts* 324 (4th ed. 1971) (duty depends on "the relationship between individuals which imposes on one a legal obligation for the benefit of the other"). In *United Scottish Insurance*, the FAA certified Aerodyne's installation of a heater in an airplane owned by Air Wisconsin. Years later, Air Wisconsin conveyed the airplane to Catalina-Vegas; the subsequent airplane accident caused property damage to respondent Dowdle, who owned Catalina-Vegas, and personal injury to the passengers. The relationship between the FAA and the injured parties in *Varig Airlines* and *Mascher* is even more remote. The FAA issued an airworthiness certificate to Boeing, which sold the airplane to Seaboard, which sold the plane to Varig; the airplane accident occurred 15 years after the allegedly negligent action and caused property damage to Varig and personal injury to its passengers.

Respondents have cited no case in which a private person has been held liable for gratuitous conduct that caused injuries so far removed from the alleged negligent act. In the California cases, the duties were created because of the direct, personal services that were provided and relationships that existed between the parties—employ-

ers and employees, merchants and customers, responsible adults and dependent minors; more important, in each of these cases the defendant acted negligently in his dealings *with the plaintiff*. By contrast, the FAA has no comparable relationship with respondents, and respondents had absolutely no interest in the airplanes at the time of the allegedly negligent inspections. See also page 38, *infra*.[31]

Moreover, it is plain that the FAA's inspections were not "necessary" to protect anyone. In the foregoing examples from California law, once the defendant chose to perform a service for the plaintiff, the defendant's due care was essential to protect the plaintiff from harm. Under the Federal Aviation Act, however, the manufacturer and operator of an aircraft retain the primary responsibility (49 U.S.C. 1425(a)) to insure compliance with FAA standards, regardless of the nature or extent of an FAA inspection, and this includes an express duty to inspect their own equipment. An accident caused by the breach of *those* duties gives rise to liability. See notes 11, 16, *supra*. The FAA, on the other hand, merely possesses the governmental authority to check on the manufacturer's and operator's work; it does not attempt to review every detail in the applicant's submission. Indeed, as noted above (see pages 7, 9, *supra*), the FAA's internal operating rules expressly permit the agency to issue

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[31] Respondents in *United Scottish Insurance* (Br. in Opp. 5) have attempted to bolster their state law argument by relying upon *Dahms* v. *General Elevator Co.*, 214 Cal. 733 (1932). In *Dahms*, the defendant had contracted with the plaintiff's employer to maintain and repair an elevator, which later fell and injured plaintiff. The FAA's inspections, which are designed to protect the public, are in no way comparable to inspections by a private company that contracts to guarantee the safety of a particular piece of equipment. "Our common law has always placed great emphasis on possible pecuniary benefit to the defendant as a criterion in determining whether or not he is under a duty of care." Gregory, *Gratuitous Undertakings and the Duty of Care*, 1 DePaul L. Rev. 30, 53 (1951). Nor can respondents argue that their relationship with the FAA as third and fourth party "beneficiaries" is at all comparable to the direct relationship between the plaintiff and the defendant in *Dahms*.

a certificate without examining all aspects of a design or modification that are submitted for approval.

2. *Respondents Did Not And Could Not Reasonably Rely on the FAA's Inspections and Certifications in these Cases*

To recover under the good samaritan doctrine, it is not sufficient to show that the good samaritan negligently performed a necessary service. The plaintiff must also prove that the effect of any negligent conduct was either to increase the risk of harm or to cause injury because of another person's justifiable reliance on the undertaking.[82] The first alternative is plainly inapplicable to this situation, because the government's issuance of a certificate cannot possibly increase the risk of harm created by the manufacturer's or operator's negligence. See, *e.g.*, 82-1350 Pet. App. 14a; *Zabala Clemente* v. *United States*, 567 F.2d 1140, 1145 (1st Cir.), cert. denied, 435 U.S. 1006 (1978); *Gelley* v. *Astra Pharmaceutical Products, Inc.*, 610 F.2d 558, 562 (8th Cir. 1979).

The court of appeals concluded, however, that liability was appropriate because "[t]he United States should expect that members of the public will rely on the proper performance by the F.A.A. of the duty to inspect and certify" (82-1349 Pet. App. 5a). We question whether this unsubstantiated assertion is accurate with respect to large segments of the American public. But the assertion is surely preposterous with respect to the passengers in *Mascher*, who were Brazilian residents flying from Rio de Janeiro to Paris in an airplane owned and operated by a Brazilian airline. Apparently, according to the court of appeals, the United States should expect that members of the Brazilian public (and, presumably, citizens of other

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[82] A third ground for liability arises if the good samaritan undertakes to perform a duty owed by another to a third person. *Restatement (Second) of Torts* § 324A(b) (1965). That aspect of the doctrine does not apply to these cases, because the manufacturer or operator of an aircraft retains the primary duty under the statute to comply with minimum safety standards. The FAA's certification process in no way substitutes for that duty.

countries as well) are aware of and will rely on the FAA's certification procedures.

In any event, general reliance of the sort described by the court of appeals is not sufficient to impose liability on the government as a good samaritan. As the Eighth Circuit recognized in an analogous context, " 'reliance on the inspection in general is not sufficient * * * to impose a duty of care * * *. Instead, the reasonable reliance must be based on specific actions or representations which cause the persons to forego other alternatives of protecting themselves.' " *Gelley* v. *Astra Pharmaceutical Products, Inc.*, *supra*, 610 F.2d at 561, quoting *Cracraft* v. *City of St. Louis Park*, 279 N.W.2d 801, 806-807 (Minn. 1979).[33] Similarly, in *Zabala Clemente* v. *United States*, *supra*, 567 F.2d at 1148, the First Circuit held that the FAA's failure to comply with a local directive to warn passengers of "any safety problems" created no liability because passengers did not know about the specific duties the FAA imposed on its employees and thus could not have relied to their detriment on the FAA. See also *Sellfors* v. *United States*, 697 F.2d 1362, 1365 (11th Cir. 1983), petition for cert. pending, No. 82-1178 (filed May 2, 1983); *Patentas* v. *United States*, 687 F.2d 707, 717 (3d Cir. 1982); *Davis* v. *United States*, 536 F.2d 758 (8th Cir. 1976), aff'g 395 F.Supp. 793 (D. Neb. 1975); *Davis* v. *Liberty Mutual Insurance Co.*, 525 F.2d 1204, 1208 (5th Cir. 1976).

The court of appeals thus erred in holding that tort liability could be predicated on an alleged knowledge commonly held by passengers that the FAA inspects and certifies aircraft. Applying the proper standard of reliance, it is plain that the passengers in *United Scottish Insurance* could not have relied within the meaning of Section 324A; they were wholly unaware that the FAA issues

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[33] This more limited concept of reliance is fully consistent with our submission regarding the type of service that is required under the good samaritan doctrine. Specific reliance will generally follow when one person performs a direct service for another. But the FAA performed no service for any of the respondents.

supplemental type certificates, and, even if they had known, nothing in the record indicates that anyone decided to forego alternative protections because of the FAA's certification process. Even less of a claim can be made that the Brazilian passengers in *Mascher* relied on the CAA's issuance of a type certificate to Boeing in 1958, 15 years before they decided to board their flight to Paris.[34]

Respondents Dowdle and Varig Airlines claim that they knew that the FAA had issued a certificate of airworthiness and they relied upon that document in deciding to purchase their planes.[35] Aside from the obvious point that these claims sound precisely like claims of misrepresentation (see pages 46-50, *infra*), it is clear that respondents' reliance on the FAA was wholly unjustified. Given the nature of the FAA's certification program, it is unreasonable for anyone to rely upon the agency's law enforcement activities to *guarantee* an aircraft's safety. In finding reliance, the court of appeals in *United Scottish Insurance* emphasized that Congress "occup[ied] the

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[34] Respondents in *Mascher* rely solely on an affidavit of the brother of one of the passengers (see Brief for Appellant in No. 81-5399, at 8-9) asserting that the deceased passenger had "complete faith" in American planes because they were subject to rigid government inspections. If such generalized expectations were sufficient, virtually everyone could be said to rely on the FAA's efforts to enforce compliance with safety regulations; under the court of appeals' theory, the United States would be liable whenever a plane manufactured in the United States crashed anywhere in the world due to a mechanical failure.

[35] Varig's actual reliance on the FAA's certification process is belied by the record. When Varig had the aircraft exported from the United States, it did not even request the issuance of a Class I Export Certificate of Airworthiness from the FAA (see page 7, *supra*). In the absence of such a certificate, the United States government makes no representation of regulatory compliance with respect to an exported aircraft. 14 C.F.R. 21.335(e). When the aircraft was sold to Varig in 1969, four years prior to the crash, it was removed from the United States Civil Aircraft Registry and from the regulatory authority of the FAA (J.A. 104). The aircraft, at that time, was placed on the Brazilian registry, and, accordingly, was within the Brazilian government's control. J.A. 106.

field of" commercial aviation safety in 1926 (82-1350 Pet. App. 4a). But Congress by this action merely assumed for the federal government regulatory responsibilities previously exercised by the states; it never intended to preempt the safety responsibilities of the airline industry. Congress instead directed the FAA to enforce the obligations of those who *do* have the duty to guarantee safety—aircraft operators and manufacturers. See *Raymer* v. *United States*, 660 F.2d 1136 (6th Cir. 1981), cert. denied, 456 U.S. 944 (1982). Consistent with this direction, the agency has never undertaken to check—or held itself out as checking—every detail of every aircraft. See pages 7-9, *supra*; pages 43-46, *infra*. In all phases of the certification process, the agency relies on the industry, not vice versa; given the FAA's resources, it could not possibly investigate every potential safety defect.

Thus, it would be unreasonable for the purchaser of an airplane to rely upon the FAA's certification papers as a guarantee of safety or to forego other efforts to check the airworthiness of such a substantial investment. It is conceivable that no FAA employee ever inspected the aircraft in question, and even if there had been an FAA inspection,[36] more likely than not it would have been a mere spot check in the case of a reputable manufacturer or installer (*Handbook*, *supra*, at 39). Indeed, even after years of discovery in these cases there is nothing in the records indicating precisely what type of inspection of the airplanes was conducted or by whom. Under these circumstances, purchasers of aircraft must rely on the assurances of manufacturers and installers—here, Boeing and Aerodyne—rather than the FAA.

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[36] Obviously, if the inspection were conducted by a designated representative of the manufacturer, then the United States would not be liable since the FTCA is limited to claims of negligence by federal employees. See *United States* v. *Orleans*, 425 U.S. 807 (1976); *Garbarino* v. *United States*, 666 F.2d 1061, 1066 (6th Cir. 1981).

3. *The Relationship Between the FAA and Respondents is Too Remote to Create A Duty of Care*

The foregoing examination of the specific elements of the good samaritan doctrine reveals that the FAA's certification process is fundamentally different from the kinds of operational activities that the doctrine was designed to address. Accordingly, neither the good samaritan duty nor any other duty of care can be extended to the agency's action that would run to respondents.

The key to the existence of a duty "always is whether the putative wrongdoer has advanced to such a point as to have launched a force or instrument of harm, or has stopped where inaction is at most a refusal to become an instrument for good." *H. R. Moch Co.* v. *Rensselaer Water Co.*, 247 N.Y. 160, 167, 159 N.E.2d 896, 898 (1928) (Cardozo, J.). The FAA's certification process is designed to be an "instrument for good"; it does not create any new danger, and it does not engender any reliance beyond that created by the manufacturer's and operator's duty to build and maintain an aircraft that complies with minimum safety standards. Respondents argue, as did the plaintiffs in *H. R. Moch*, that by retaining the option to inspect for defects, the FAA "was brought into such a relation with everyone who might potentially" use the airplane "as to give to negligent performance * * * the quality of a tort." *Ibid.* Justice Cardozo's answer applies equally here: "The law does not spread its protection so far." *Ibid.*, quoting *Robins Dry Dock & Repair Co.* v. *Flint*, 275 U.S. 303 (1927) (Holmes, J.). Since respondents have failed to show that the United States would be liable as a private person under the good samaritan doctrine, recovery is barred under 28 U.S.C. 1346(b) and 2674.

II. THE DISCRETIONARY FUNCTION EXCEPTION TO THE FEDERAL TORT CLAIMS ACT BARS LIABILITY BASED ON THE ALLEGED NEGLIGENCE OF THE FAA IN CARRYING OUT ITS REGULATORY DUTY OF ISSUING AIRWORTHINESS CERTIFICATES

A. The Discretionary Function Exception Is Intended To Shield Regulatory Activities Such As Those Undertaken By the FAA From Private Tort Litigation

The Tort Claims Act precludes recovery for claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. 2680(a). This provision, like the private person limitation in 28 U.S.C. 1346(b) and 2674, is intended to insulate the United States from "liability arising from acts of a governmental nature or function," where the agency's exercise of judgment should not be subject to judicial oversight. *Dalehite* v. *United States*, 346 U.S. 15, 28 (1953). The FAA regulatory decision-making challenged by respondents falls squarely within this exception.

As the Court noted in *Dalehite* v. *United States*, *supra*, 346 U.S. at 26, "[t]he meaning of the governmental regulatory function exception from suits * * * shows most clearly in the history of the Tort Claims Bill in the Seventy-seventh Congress." The FTCA was the product of more than two dozen different bills introduced since 1923. See *United States* v. *Spelar*, 338 U.S. 217, 219-220 (1949). Many of the earlier bills contained specific exceptions from liability that "were couched in terms of specific spheres of federal activity, such as postal service, the activities of the Securities and Exchange Commission, or the collection of taxes." *Dalehite* v. *United States*, *supra*, 346 U.S. at 26 (footnote omitted). See,

e.g., Section 303(7) of S. 2690, 76th Cong., 1st Sess. (1939) and Section 303(7) of H.R. 5299, 77th Cong., 1st Sess. (1941), exempting claims arising from enforcement activities of the Federal Trade Commission and the Securities and Exchange Commission. The 77th Congress removed the exemptions granted to specific agencies and expanded the exception to include all discretionary functions. Congress made the change with the declared intent to bar "claims against Federal agencies growing out of their regulatory activities." House Comm. on the Judiciary, 77th Cong., 2d Sess., *Federal Tort Claims Act, Memorandum, With Appendices, Explanatory of Comm. Print of H.R. 5373*, at 8 (Comm. Print 1942). The efforts of the FAA to detect violations of its minimum safety standards are as much a discretionary regulatory activity as attempts by the FTC or SEC to ferret out infractions of their statutes and rules.

The only decision of this Court expressly interpreting Section 2680(a) is *Dalehite* v. *United States*, *supra*. There the Court held that the discretionary function exception barred a series of suits against the United States resulting from the disastrous explosion of ammonium nitrate fertilizer, which had been produced and distributed according to the specifications and under the control of the United States. The Court concluded that the discretionary function exception prohibited claims based on (1) the cabinet-level decision to institute the fertilizer program; (2) the need for further experimentation with the fertilizer to determine the possibility of explosion; (3) the drafting of the basic plan of manufacture, including the decisions regarding the coating, bagging temperature and bagging materials, and (4) the failure to police properly the storage and loading of the fertilizer. 346 U.S. at 37-44. Although the Court found it "unnecessary to define, apart from this case, precisely where discretion ends," it nevertheless stated that the exception "includes more than the initiation of programs and activities." *Id.* at 35. Rather, "[w]here there is room for policy judgment and decision there is discretion. It nec-

essarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable." *Id.* at 36.

The court of appeals mistakenly ruled that the discretionary function exception does not apply to the FAA's certification activities because it concluded that, in light of the agency's detailed regulations, "no room for policy judgment or decision exists * * *" (82-1350 Pet. App. 5a). In the court of appeals' view, "[a] proper inspection will discover facts. The facts will show either compliance or noncompliance" with the FAA's safety standards (82-1349 Pet. App. 7a). These assertions reflect an unduly narrow view of what constitutes a discretionary function and grossly oversimplify and mischaracterize the FAA's role both in enforcing minimum safety standards and in deciding whether to issue an airworthiness certificate to an applicant.[37]

The FAA's certification process has both an active and a passive quality. The agency does review certification applications and decides in the exercise of its best scientific and engineering judgment whether aspects of a proposed design satisfy the minimum safety standards and thus will be airworthy. The agency, however, also declines to review some details in every application because of resource limitations and other considerations. Even if it were possible in theory to check *every* facet of *every* aircraft before issuing the various certificates, the undertaking would require an enormous increase in agency personnel and a major restructuring of operating procedures. The court of appeals' syllogism of inspection leading to factual determinations leading to a virtually ministerial determination of compliance is therefore a distortion of the actual process. What the court's superficial analysis ignores is the significant amount of discretion that the agency necessarily exercises in making the

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[37] Indeed, the FAA's determination whether to issue a type certificate has been characterized as a "regulatory adjudication." See Harrison and Kolczynski, *Government Liability for Certification of Aircraft?*, 44 J. of Air L. & Com. 23, 35 (1978).

public interest determination of whether to issue a requested certificate. Section 2680(a) was intended to shield that discretion from judicial second-guessing in the form of tort litigation.

B. The FAA's Certification Process Is Permeated with Discretionary Conduct of the Sort Typically Protected By Section 2680(a)

1. *The Decision To Approve An Aircraft's Design Requires Scientific and Engineering Judgment*

The FAA's determination that a particular aircraft design or modification satisfies its regulatory standards is closely analogous to agency action that the lower courts have held to be barred from suit under the FTCA. In *First National Bank in Albuquerque* v. *United States*, 552 F.2d 370 (10th Cir.), cert. denied, 434 U.S. 835 (1977), for example, the court of appeals held that claims based on alleged negligence by Department of Agriculture employees in approving, under the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. (& Supp. V) 135 *et seq.*, the labeling of grain treated with a poisonous substance was barred by the discretionary function exception because the government had to make a scientific assessment of what the public safety requires in evaluating the adequacy of the labeling. See also *Gelley* v. *Astra Pharmaceutical Products, Inc.*, *supra*, (discretionary function exception bars a claim based on the Food and Drug Administration's scientific determination to allow a drug to remain in interstate commerce in misbranded or adulterated condition).

Similarly, the judgments involved in these cases cannot be characterized as the ministerial application of a clear standard to a particular fact situation. FAA employees must make difficult scientific and engineering judgments in deciding whether to approve a particular design or change in a design.[38] The determination in *United Scot-*

[38] The development and promulgation of the FAA's airworthiness standards is a function that involves technical judgment and policy considerations at the highest levels of the FAA. To a layperson, the airworthiness standards may appear to be very detailed and

tish Insurance whether a gasoline line in a heater has "excessive vibration" on the one hand (14 C.F.R. 23.993 (a)) or sufficient flexibility to withstand stress on the other requires a difficult, and essentially subjective, engineering assessment. By the same token, the determination in *Varig Airlines* and *Mascher* whether waste receptacles adequately provide for "containing possible fires" (see note 16, *supra*) calls for an inherently subjective and predictive judgment.[39]

2. *The FAA Has Discretion To Approve Aircraft As Airworthy Without Checking Every Detail to Assure Compliance With Minimum Standards*

Even if the court of appeals were correct in concluding that the FAA's decision to approve a particular design that it has inspected is not discretionary, its analysis fails to take account of the agency's discretion to issue a certificate without verifying that there has been compliance with every minimum safety standard. The court of appeals inferred from the detail of the FAA's safety standards that the agency had fully exercised its administrative discretion in favor of exhaustive inspections designed to guarantee the airworthiness of an approved aircraft. But the purpose of the detailed standards is to guide *manufacturers* in designing and building minimally safe aircraft; the standards do not lessen the

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explicit. To the designer, engineer, flight test pilot or inspector, however, the standards are relatively general and require considerable discretion in their application. See note 39, *infra*. Indeed, in order not to inhibit new design concepts or techniques, and to permit flexibility and new technologies, the airworthiness standards are intentionally worded to achieve a safety objective without establishing fixed design specifications. See *NAS Report*, *supra*, at 25, 33.

[39] The examples in the text are not atypical. For example, the flight requirements for aircraft "must show suitable stability and control 'feel' * * * in any condition normally encountered in service * * *." 14 C.F.R. 23.171. Similarly, the standard for an aircraft's electrical system is generally that it "must be adequate for its intended use." 14 C.F.R. 23.1351(a). The application of these standards is obviously not a ministerial chore.

FAA's inherent discretion to decide how to allocate its resources in attempting to administer its statute. Indeed, if anything, the very quantity and detail of the regulations emphasize that the FAA must retain flexibility to rely upon private industry to protect aircraft safety.

> Within the regulatory concept of the certification process there may be endless opportunity for the discovery of error. Yet inherent in the FAA's regulatory auditing process, which contemplates a review of tests reasonably necessary to demonstrate compliance with minimum standards, lies the reality that not all errors and defects can be discovered.

Harrison and Kolczynski, *Government Liability for Certification of Aircraft?*, 44 J. of Air L. & Com. 23, 43 (1978). The FAA, with a few hundred inspectors, simply cannot ensure that each of its regulations has been satisfied before issuing a type certificate, supplemental type certificate, or airworthiness certificate—any more, for example, than a municipal inspection station can ensure that every automobile is safe before issuing a yearly registration sticker. Some judgment must be made concerning how best to use the finite resources available to maximize compliance with the statute; this judgment involves a determination of both whether any inspection is necessary, and, if so, how extensive that inspection should be.[40]

The court of appeals appeared to assume that the FAA purports to check compliance with every safety standard for every certified aircraft. But the FAA *Handbook* clearly indicates that inspectors are free to decide whether and how thoroughly to review the manufac-

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[40] See, *e.g.*, Parrish, *Outfitting in 1983: A Buyer's Market*, 52 Bus. & Com. Aviation 76, 82 (1983):

> When a newly outfitted or refurbished aircraft is inspected by the FAA for compliance with regulations, there is no way for agency inspectors to confirm that all the interior materials and installations procedures—particularly regarding the use of new-technology materials—meet the applicable standards. Inspectors and operators must rely on the integrity of the outfitting center and its suppliers to use the appropriate materials.

turers' efforts in any given situation (*Handbook*, *supra*, at 39; pages 7-9, *supra*). The provision describing inspections for supplemental type certifications, for example, authorizes the inspector to rely upon spot checks of manufacturers who have proven reliability (see pages 7-8, *supra*). Even more discretion to defer to the manufacturer's engineers is granted in the design review process leading to type certification. See *NAS Report*, *supra*, at 29; see note 9, *supra*.

This discretion is critical to the FAA's effort to impose its standards on an entire industry. Like many federal agencies, the FAA polices the industry it regulates. The FAA possesses authority to seek civil penalties for violations of the certification requirements, 49 U.S.C. (& Supp. V) 1471, and may even pursue criminal penalties if the violation is knowing and willful. 49 U.S.C. (& Supp. V) 1472. The more common sanction is to strip the manufacturer or operator of its certification, thereby effectively grounding the aircraft. 49 U.S.C. 1425. The inspection process is the central means by which the FAA discovers violations and thereby enforces its laws, and it is thus crucial that the FAA be permitted to decide for itself which aircraft to inspect and how extensive that inspection should be.[41] Courts have no competence to oversee these law enforcement determinations.

In some instances, the FAA may determine that a complete examination is in order; in other cases, it may decide that only a spot check is warranted; on yet other occasions, the agency may conclude that (given the manufacturer or installer's track record and representations) no further inspection need be made. Whichever choice is made, a certificate eventually will issue, although it is generally impossible long after the fact to reconstruct the

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[41] Lower courts have uniformly held that discretionary decisions implementing analogous types of law enforcement activities are immunized by the discretionary function exception. See, *e.g.*, *Hoffman* v. *United States*, 600 F.2d 590 (6th Cir. 1979), cert. denied, 444 U.S. 1073 (1980); *Lawrence* v. *United States*, 381 F.2d 989, 990-991 (9th Cir. 1967); *Smith* v. *United States*, 375 F.2d 243 (5th Cir.), cert. denied, 389 U.S. 841 (1967).

type of inspection performed. In essence, respondents claim that the FAA should have undertaken a more painstaking inspection prior to issuing airworthiness certificates to the specific aircraft involved here. But the decision whether to do so, or instead to choose one of the other reasonable regulatory alternatives, is protected by the discretionary function exception. See *Garbarino* v. *United States*, *supra*, 666 F.2d at 1065-1066.

In sum, the court below utterly disregarded the FAA's regulatory role and adopted a rule that would require the FAA to change dramatically its regulatory function from that of a policeman to that of a mechanic or repairman (see note 22, *supra*), with a corresponding need to reallocate its resources. Congress adopted the discretionary function exception precisely to prohibit such judicial restructuring of an agency's assigned responsibilities.

III. THE MISREPRESENTATION EXCEPTION TO THE FEDERAL TORT CLAIMS ACT BARS RESPONDENTS' CLAIMS BASED SOLELY ON THEIR RELIANCE ON THE FAA'S INSPECTION AND CERTIFICATION ACTIVITIES

When Congress in 1946 waived the sovereign immunity of the United States for many common law torts, it recognized that there were "a series of torts as to which, for the time being at least, it may be dangerous for the government to subject itself to suit * * *." *Tort Claims Against the United States: Hearings on S. 2690 Before a Subcomm. of the Senate Comm. on the Judiciary*, 76th Cong., 3d Sess. 13 (1940). See also *id.* at 22; S. Rep. No. 1400, 79th Cong., 2d Sess. 33 (1946); H.R. Rep. No. 1287, 79th Cong., 1st Sess. 6 (1945). Accordingly, Congress expressly exempted from the Tort Claims Act "[a]ny claim arising out of," *inter alia*, "misrepresentation." 28 U.S.C. 2680(h). If, contrary to our submissions in parts I and II, respondents have stated a claim that satisfies the "private person" requirement in Sections 1346(b) and 2674 and is not barred by the discretionary function exception in Section 2680(a), respondents' claims arise out of the tort of misrepresentation, and thus recovery against the United States is precluded.

All of respondents' claims ultimately derive from an alleged reliance by respondents Dowdle and Varig, in purchasing the airplanes that crashed, upon the FAA's issuance of a certificate which represented that the airplanes were airworthy when in fact they may not have been. Such claims constitute what is commonly understood as the tort of misrepresentation.

Section 311 of the *Restatement (Second) of Torts* (1965) defines the tort of negligent misrepresentation involving risk of physical harm as follows:

> (1) One who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results
>
> (a) to the other; or
>
> (b) to such third persons as the actor should expect to be put in peril by the action taken.
>
> (2) Such negligence may consist of failure to exercise reasonable care
>
> (a) in ascertaining the accuracy of the information, or
>
> (b) in the manner in which it is communicated.

Illustration 8 of Section 311 is directly analogous to the facts of this case. That illustration states:

> The A Boiler Insurance Company undertakes as a part of its services to inspect the boiler of B. It issues a certificate that the boiler is in good condition for use. In reliance upon this certificate, B uses the boiler. The boiler bursts, owing to a defect which a reasonably careful inspection would have disclosed. Explosion of the boiler wrecks the adjacent building of C and causes bodily harm to him. The A company is subject to liability to C for his bodily harm and the wrecking of his building caused by the explosion of the boiler.[42]

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[42] This illustration also was used in the *Restatement of Torts* § 311 (1934). In enacting Section 2680(h), Congress intended to adopt the commonly understood definition of "misrepresentation," *United States* v. *Neustadt*, 366 U.S. 696, 707 (1961), which is best ascertained from the *Restatement of Torts* in existence at the time.

See *Reynolds* v. *United States*, 643 F.2d 707 (10th Cir.), cert. denied, 454 U.S. 817 (1981); *Anglo-American & Overseas Corp.* v. *United States*, 144 F.Supp. 635, 636 (S.D.N.Y. 1956), aff'd, 242 F.2d 236 (2d Cir. 1957).[43]

Just as in the boiler illustration, respondents allegedly relied here on the certificate issued by an inspector. In *United Scottish Insurance*, respondents' evidence was that they relied on the communication in the FAA's certificates regarding the heater's installation and the plane's airworthiness. The mechanic sent by respondent Dowdle, the purchaser of the plane, to inspect the Dehavilland Dove prior to the sale testified that he relied on the FAA's airworthiness certificate as establishing that the heater had been properly installed (J.A. 229) and that he usually did not go behind this "paperwork" to check an airplane himself (*ibid.*). In other words, respondents relied on the allegedly incorrect communication from the FAA, which is the essence of the tort of misrepresentation. Similarly, the claims in the *Varig Airlines* and *Mascher* cases—that the Brazilian airline relied to its detriment on the allegedly false statement in the FAA certificate issued to Boeing that the plane was airworthy —plainly arise out of misrepresentation.

The court of appeals ruled, however, that respondents' claims were based on the "negligent inspection" and, hence, were not precluded by Section 2680(h). The rea-

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[43] Prior to the enactment of the Tort Claims Act, it was common for inspectors to be sued under a theory of negligent misrepresentation for the "careless performance of a service" leading to "careless words" certifying the existence of a particular set of facts. *Glanzer* v. *Shepard*, 233 N.Y. 236, 135 N.E. 275 (1922). See also *Mulroy* v. *Wright*, 185 Minn. 84, 240 N.W. 116 (1931); *Ultramares Corp.* v. *Touche*, 255 N.Y. 170, 174 N.E. 441 (1931); *National Iron & Steel Co.* v. *Hunt*, 312 Ill. 245, 143 N.E. 833 (1924); *Gordon* v. *Livingston*, 12 Mo. App. 267 (1882); *Tardos* v. *Bozant*, 1 La. Ann. 199 (1846); Annot., 68 A.L.R. 375 (1930); Annot., 34 A.L.R. 67 (1925); F. Harper, A *Treatise on the Law of Torts* § 76 (1933). In some cases, however, recovery was denied because the particular jurisdiction did not recognize the tort of negligent misrepresentation.

soning of the court of appeals is flatly inconsistent with this Court's decision in *United States* v. *Neustadt*, 366 U.S. 696 (1961). In *Neustadt*, the Court held that a claim that the Federal Housing Administration had negligently inspected a house and had misled plaintiffs into purchasing the house because of a false "Statement of FHA Appraisal" was merely "to state the traditional and commonly understood legal definition of the tort of 'negligent misrepresentation' " for which recovery against the United States was barred. 366 U.S. at 706.

As in *Neustadt*, the instant cases involve a situation in which a government employee allegedly was negligent in inspecting and certifying in a written report that the object inspected was in good condition. Here again, as in *Neustadt*, respondents claimed that they were injured as a result of their reliance on the false information conveyed to them by the report issued by the government. There is simply no way to avoid characterizing respondents' claims as ones of negligent misrepresentation.

This Court's decision in *Block* v. *Neal*, No. 81-1494 (Mar. 7, 1983), is not to the contrary. In *Neal*, the Court held that Section 2680(h) did not require dismissal of a complaint alleging that the Farmers Home Administration had breached a duty to inspect and *supervise the construction of* plaintiff's home. The Court described the gist of the plaintiff's claim as follows: "FmHA officials voluntarily undertook to *supervise construction of* her house, [and] * * * the officials failed to use due care in carrying out their *supervisory* activity * * *." Slip op. 8 (emphasis added). The Court reasoned that since the plaintiff had alleged that the inspection in *Neal* gave rise to a duty on the FmHA inspector to do more than simply communicate the results of the inspection, plaintiff's claims based on the duty to *supervise* were not barred by the misrepresentation exception. The Court did not, however, cast any doubt on the holding in *Neustadt* that Section 2680(h) precludes a claim that a plaintiff relied on a communication that was the product of an allegedly negligent governmental inspection. See slip op. 7-8.

Respondents' claims cannot be construed as involving anything more than reliance on the incorrect communication of information through the issuance of certificates. Respondents were not involved in the FAA's inspection and certification process; thus, even if some other duty could be derived from the inspection process, it would extend only to the persons in the position comparable to the plaintiff in *Neal*—Aerodyne in *United Scottish Insurance* and Boeing in *Varig Airlines* and *Mascher*. No duty other than the issuance on an accurate certificate based on the inspection could possibly extend to third or fourth parties such as respondents.[44] See, *e.g.*, *Baroni* v. *United States*, 662 F.2d 297 (5th Cir. 1981), cert. denied, No. 81-1326 (Mar. 21, 1983); *Reynolds* v. *United States*, *supra*.

In the present cases, there is no activity on the part of the government analogous to the supervision of the construction of the plaintiff's home in *Neal*. Here, respondents incurred injury because they allegedly relied, directly or indirectly, on the government's misrepresentation, which was communicated through a certification document. Accordingly, respondents' claims are barred by the misrepresentation exception to the Tort Claims Act.

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[44] Indeed, it was remote claims by individuals in the position of respondents that in all likelihood prompted Congress to include the misrepresentation exception in the Tort Claims Act. England denied recovery for all negligent misrepresentations until 1963. Compare *Derry* v. *Peek*, 14 App. Cas. 337 (1889), with *Hedley Byrne & Co.* v. *Heller & Partners*, 1964 App. Cas. 465. According to Dean Prosser, a majority of courts in this country follow *Derry* v. *Peek*, and deny recovery for innocent or negligent misrepresentations generally, out of fear that the scope of liability would be difficult to limit once recovery is recognized. See W. Prosser, *Handbook of the Law of Torts* 706-707 (4th ed. 1971); *Ultramares Corp.* v. *Touche*, 255 N.Y. 170, 179, 174 N.E. 441, 444 (1931).

CONCLUSION

The judgments of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

28 U.S.C. 1346 (b) provides, in pertinent part:

> [T]he district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, * * * for injury * * * or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2674 provides, in pertinent part:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances * * *.

28 U.S.C. 2680 provides, in pertinent part:

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> (a) Any claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the diseretion involved be abused.
>
> * * * * *
>
> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights * * *.

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